IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-192

J. JEROME OLITT,

*Petitioner,*

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES D. PORTER, JR.
*Attorney for Respondent*
*The Association of the Bar*
*of the City of New York*
36 West 44th Street
New York, New York 10036
Telephone: (212) 840-3550

SAUL FRIEDBERG
*Of Counsel*

In the

# Supreme Court of the United States

October Term, 1978

No. .....

J. Jerome Olitt,

*Petitioner,*

—against—

The Association of the Bar of the City of New York,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### Statement of the Case

Respondent, The Association of the Bar of the City of New York, files this brief in opposition to petitioner's Petition for a Writ of Certiorari.

### ARGUMENT

### The Petition Should Be Denied

1. The first Question Presented refers to no possible error by the New York courts. The New York courts did not bar petitioner from access to the federal courts.

Petitioner's federal action to enjoin the state courts, referred to at petition p. 5, was dismissed by the United States District Court, the dismissal was affirmed by the

In the

# Supreme Court of the United States

October Term, 1978

**No. .....**

J. Jerome Olitt,

*Petitioner,*

—against—

The Association of the Bar of the
City of New York,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### Statement of the Case

Respondent, The Association of the Bar of the City of New York, files this brief in opposition to petitioner's Petition for a Writ of Certiorari.

### ARGUMENT

### The Petition Should Be Denied

1. The first Question Presented refers to no possible error by the New York courts. The New York courts did not bar petitioner from access to the federal courts.

Petitioner's federal action to enjoin the state courts, referred to at petition p. 5, was dismissed by the United States District Court, the dismissal was affirmed by the

United States Court of Appeals, and this Court denied certiorari. *Anonymous* v. *Association of the Bar,* 515 F 2d 427 (2d Cir. 1975), certiorari denied, 423 U.S. 863 (1975).

2. Petitioner's second Question Presented is insubstantial and does not merit review.

The New York Court of Appeals, in *Matter of Anonymous,* 41 NY 2d 506 (1977), gave full, careful and correct consideration to the question and decided it the other way. *Spevack* v. *Klein,* 385 U.S. 511 (1967), has no bearing. It decided that an attorney could not be disciplined for invoking the Fifth Amendment. It did not decide that immunized testimony could not be used in a disciplinary proceeding.

3. Petitioner's third Question Presented is based on a flagrant misstatement of the record.

Petitioner says that he "received a promise from the assistant district attorney . . . that he would not initiate or refer the . . . matter to the Committee on Grievances . . ." and that this alleged promise was violated. (petition, p. 4). However, the Referee found, after a full trial of the matter, "that the respondent has failed to prove by a fair preponderance of credible evidence that the District Attorney of New York County, by his assistant, Frank J. Rogers, made the promise to respondent or his attorneys as is alleged herein." (petition, p. 70).

4. The fourth Question Presented raises no Fourteenth Amendment question.

The New York Criminal Procedure Law § 190.25.5 mandates the secrecy of grand jury proceedings but permits their disclosure upon application and "upon written order of the court." The New York Court of Appeals has held



that an application to disclose grand jury proceedings in the public interest may be made and granted without notice to the witnesses whose testimony will be disclosed. *People* v. *DiNapoli,* 27 NY 2d 229 (1970).

New York's discretion in this area is not restricted by the Fourteenth Amendment which does not mandate the secrecy of state grand jury proceedings; nor, where they are made secret by state statute, does it mandate notice to the witnesses involved of an application under state statute for disclosure.

5. The fifth Question Presented raises no Sixth or Fourteenth Amendment questions.

The Sixth Amendment refers only to criminal trials, which a disciplinary proceeding is not. *Matter of Anonymous,* 41 NY 2d 506 (1977) (*supra*).

The requirement of a speedy trial, even in criminal cases, applies to the period between the formal charge (by indictment or otherwise) and the trial, not to the period of time occupied by the pre-formal charge investigation.

Respondent learned of petitioner's matter in January 1970 and investigated for three years, not notifying petitioner of its investigation until January 1973. It served formal charges May 31, 1973 and the trial was held June 21, 1973. (petition, pp. 4-5, 59-61).*

Petitioner, therefore, in fact received a very speedy trial.

If petitioner's fifth Question Presented is considered a due process rather than a speedy trial question—on the basis of the claim of laches—the short answer is that the Referee found, after a full trial of the issue: "I do not

* All further delays resulted from deliberate delaying moves by petitioner. (petition, pp. 5-7, 60)

believe that the respondent has been prejudiced to the extent that these proceedings should be barred." (petition, p. 61).

**Conclusion**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES D. PORTER, JR.
*Attorney for Respondent*
*The Association of the Bar*
*of the City of New York*
36 West 44th Street
New York, New York 10036
Telephone: (212) 840-3550

SAUL FRIEDBERG
*Of Counsel*

Dated: New York, N.Y.
August 16, 1978

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775